

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 60534-8-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
GAYLON LEE THIEFAULT)	
)	
Respondent.)	FILED: August 24, 2009
)	

Appelwick, J. — Thiefault contests his life sentence under the Persistent Offender Accountability Act (POAA), arguing the State failed to prove that his Montana conviction for attempted robbery is comparable to a Washington offense. Because at the time Thiefault pleaded guilty in Montana, the law of that state provided that a plea constituted an admission of the facts alleged in the charging documents, we hold the State proved factual comparability. We affirm on all grounds, but remand for the sentencing court to correct two scrivener's errors.

FACTS

This is the third appeal for Gaylon Thieffault, who was convicted of indecent liberties with forcible compulsion and attempted second degree rape. During his initial sentencing, the State noted that Thieffault had a prior Montana attempted robbery conviction and a prior federal aggravated sexual assault conviction. Thieffault did not object. The sentencing court found that Thieffault's prior Montana conviction was comparable to the Washington offense of attempted second degree robbery. The court also found that the federal conviction was comparable to the Washington offense of second degree rape. The court found that Thieffault was a persistent offender under both the two-strikes law and the three-strikes law, and sentenced him to life in prison without the possibility of parole.

Thieffault appealed to this court. State v. Thieffault, noted at 116 Wn. App. 1059, 2003 WL 21001019. He claimed that his convictions for indecent liberties and attempted second degree rape violated double jeopardy. Id. at *1. He also claimed that his federal conviction could not be counted under the two-strikes law. Id. at *4. We agreed with Thieffault on both counts, dismissed the indecent liberties conviction, and remanded for resentencing. Id. at *3–*4.

At his second sentencing, the State again argued that the Montana attempted robbery conviction and federal rape conviction were comparable to a Washington offense for the purposes of sentencing Thieffault as a persistent offender. To support its position regarding the Montana conviction, the State submitted a motion for leave to file the information, an affidavit from a

prosecutor, and the judgment. State v. Thiefault, 160 Wn.2d 409, 416 n.2, 158 P.3d 580 (2007). The State did not produce the actual information, guilty plea agreement, or any document that contained the facts that Thiefault admitted, stipulated to, or otherwise were proved beyond a reasonable doubt. Id. Thiefault was represented by a different attorney, who waived objection to the comparability of the prior offenses, because he understood the issue had already been determined. Instead, Thiefault's attorney contested the facial validity of the prior convictions. The court rejected this argument. The court incorporated its comparability findings from the prior sentencing hearing and found Thiefault to be a persistent offender. Thiefault was sentenced to life in prison without the possibility of parole, under the three-strikes law.

Thiefault appealed again, arguing that his counsel was ineffective for failing to raise a comparability challenge to the out of state convictions. State v. Thiefault, noted at 128 Wn. App. 1056, 2005 WL 1819840, at *1. We held that regarding Thiefault's federal conviction, the documents provided by the State demonstrated that he admitted to facts establishing conduct that would constitute second degree rape in Washington. Id. at *7. "The plea agreement states that Thiefault agreed to plead guilty to the indictment, which charges that 'he knowingly caus[ed another] individual to engage in sexual intercourse with him through the use of force'. This conduct would violate Washington's law prohibiting second degree rape." Id. (alteration in original) (citing RCW 9A.44.050(1)(a)). Therefore, regarding the comparability of his federal

conviction, Thiefault's counsel was not deficient. Id.

We agreed with Thiefault that his counsel was deficient in failing to challenge the comparability of the Montana conviction, because it was not legally comparable. Id. at *9. However, Thiefault failed to establish any resulting prejudice because the court could have found factual comparability based on the motion for leave to file information and the judgment, or it could have given the State the opportunity to procure other appropriate documentation. Id. Therefore, his claim of ineffective assistance of counsel failed. Id.

The Supreme Court agreed with this court that the performance of Thiefault's counsel was deficient, because the Montana robbery statute is broader than the Washington one. State v. Thiefault, 160 Wn.2d 409, 417, 158 P.3d 580 (2007). But, the Supreme Court held that the counsel's deficient performance was prejudicial because:

Although the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable; in which case, the superior court could not have deemed the Montana conviction a "strike" for purposes of the POAA. We therefore vacate Thiefault's sentence and remand the case to superior court to conduct a factual comparability analysis of the Montana conviction.

Id.

At the third sentencing, the State sought to establish that Thiefault was a persistent offender based on the federal conviction and the Montana conviction.

RCW 9.94A.030.

To establish that the Montana offense is factually comparable to a Washington robbery offense, the State supplemented the original record with a certified copy of the information filed in Ravalli County, Montana, on December 22, 1983. The information charged Thiefault with one count of attempted robbery and one count of unauthorized use of a motor vehicle. Regarding the attempted robbery charge, the information detailed Thiefault's actions as:

On or about the 13th day of December, 1983, the Defendant, GAYLON LEE THIEFAULT, did purposely or knowingly perform an act toward the commission of the crime of Robbery, a Felony, with the purpose to commit that offense by, in the course of committing the theft of cash, purposely or knowingly attempting to put Delbert David Greenfield, an Ole's Store employee, in fear of immediate bodily injury, by entering Ole's Country Store wearing a nylon stocking mask and holding a .44 magnum handgun, which was in violation of the above statute and against the peace and dignity of the State of Montana.

To prove factual comparability, the State also submitted the minute entry detailing the plea. The minute entry noted that Thiefault was present at the hearing and represented by counsel. Further, the entry detailed the plea:

Defendant answers he still understands his previously advised rights and pleads "GUILTY" to Count I, Attempt (Robbery) a felony The Court makes findings, accepts [sic] two pleas and adjudges him guilty as charged

The State also submitted the Montana judgment, filed on 4/12/1984, which stated that Thiefault was guilty of the crime of attempted robbery. Thiefault's counsel objected to the court's consideration of the Montana minute entry and

the criminal information relating to his attempted robbery charge.

Finding that neither the minute entry nor the motion to file information established facts sufficient for a comparability analysis, the superior court relied solely on the information and judgment. The court concluded that both the Montana and federal convictions were comparable to Washington offenses. Therefore, Thiefault met the criteria of a persistent offender under the three-strikes law. Thiefault was sentenced to life imprisonment without the possibility of parole. Thiefault appeals.¹

DISCUSSION

Thiefault appeals his sentence arguing that the court erred when it found his Montana conviction for attempted robbery comparable to a POAA strike.² He argues that evidence offered by the State, the information and minute entry, did not establish the facts as admitted, stipulated to, or proven beyond a reasonable doubt.

Convictions from other jurisdictions count as “most serious offenses” for the purposes of the POAA if they are comparable to Washington’s “most serious offenses.” RCW 9.94A.030(32)(u). Appellate courts conduct de novo review of a sentencing court’s decision to consider a prior conviction as a strike.

¹ As requested by this court, Thiefault filed supplemental briefing. After receiving the briefing, the State filed a motion to strike Thiefault’s brief, because it was overlength. On the same day as the State’s motion, Thiefault filed a motion requesting permission to file an overlength brief. Because the court granted the motion we do not sanction Thiefault for his late request.

² Next, Thiefault argues that his Sixth Amendment right to a jury trial was violated when the State was allowed to prove factual comparability to the trial judge. Thiefault concedes that State v. Thomas, 135 Wn. App. 474, 476, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007), and State v. Farnsworth, 133 Wn. App. 1, 16, 130 P.3d 389 (2006) control this appeal, but merely preserves the error should further review occur in state or federal court.

Thiefault, 160 Wn.2d at 414. Other questions of law are likewise reviewed de novo. Berger v. Sonneland, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

To determine if the foreign conviction is comparable, the court must first compare the elements of the foreign crime to the elements of the Washington crime. State v. Morley, 134 Wn.2d 588, 605–06, 952 P.2d 167 (1998). If an out-of-state statute prohibits a broader range of conduct than the proposed Washington counterpart—i.e., the elements of the out-of-state offense are not legally comparable—the State must prove that the offenses are factually comparable. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Id. at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006). In determining comparability, the sentencing court may look to charging documents, the written plea agreement, a transcript of the plea colloquy, and any explicit findings of fact made by the trial judge and to which the defendant assented. Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). If a court concludes that a prior foreign conviction is neither legally nor factually comparable, it may not count the conviction as a strike under the POAA. Lavery, 154 Wn.2d at 258.

In Thiefault, the Washington Supreme Court unequivocally held that the Montana attempted robbery statute is broader than the Washington statute. 160 Wn.2d at 417. But, the court remanded the case to the superior court to

conduct a factual comparability analysis of the Montana conviction. Id. Therefore, the focus of the comparability analysis presented by this appeal is whether the State proved that the Montana conviction is factually comparable to a Washington offense.³

Thiefault argues that the documents submitted by the State, specifically the information, failed to establish facts sufficient for the trial court to find comparability. He challenges the trial court's reliance on the information, asserting it is merely a prosecutor's allegation, not an admission, a stipulation, or proof found beyond a reasonable doubt.

In February of this year, in State v. Releford, this court held that in determining factual comparability for purposes of a POAA inquiry:

[T]he State may prove factual comparability by producing certified copies of foreign charging documents and evidence that the defendant pleaded guilty if the law of the state wherein the defendant entered the plea, at the time of the plea, provided that such a plea constituted an admission of the facts alleged in the charging documents.

State v. Releford, 148 Wn. App. 478, 483, 200 P.3d 729 (2009). In Releford, the court addressed a similar issue to that present here: whether the State had proven that an Oklahoma robbery conviction was factually comparable to a

³ As a threshold issue, Thiefault argues that the court erred in considering new evidence at the third sentencing hearing. He relies on the concurring opinion in Thiefault, 160 Wn.2d at 421. But, the court's majority opinion explained that if the issue has not been fully argued before the trial court and where the defendant does not object to the evidence, the State retains an opportunity to prove the classification of an offense upon remand. Id. at 417–18 n.4 (citing State v. Ford, 137 Wn.2d 472, 485–86, 973 P.2d 452 (1999)). The court directed the superior court to conduct a factual comparability analysis to determine whether the conduct underlying Thiefault's Montana conviction constitutes attempted robbery under Washington's narrower statute. Thiefault, 160 Wn.2d at 420. This necessitated additional fact finding and an opportunity for the State to present new evidence. The superior court did not err in considering the new evidence.

Washington offense when it relied on the criminal information. Id. at 487. In Oklahoma, at the time of Releford's offense for robbery, "[a] plea of guilty admits the facts pleaded in the Information." Id. at 488 (quoting Collins v. State, 1974 OK CR 79, 521 P.2d 826, 828) (alteration in original). Thus, this court held:

There is no basis for us to conclude that, where a defendant enters a plea of guilty at a point in time and in a foreign jurisdiction where such a plea constitutes an admission of the facts alleged by the government in the charging document, such an admission cannot be later relied upon to prove factual comparability for purposes of a subsequent sentencing in Washington.

Releford, 148 Wn. App. at 488.

But, here, the State argues that Releford is not applicable, because it addresses a different statutory structure than the Montana robbery statute at issue. The State claims that the Oklahoma burglary statute at issue in Releford contained a list of places where a person could enter into in order to commit the offense of burglary. In contrast, the Montana statute creates alternative means by which robbery could be committed. This argument is without merit. Releford addressed how the State can prove the factual comparability of out-of-state offenses when the statute was broader than Washington's statute. This is identical to the question on appeal here. Releford is applicable.

Under the rule announced in Releford, the comparability issue here turns on whether Thiefaul's guilty plea in Montana admitted the facts as pleaded in the information, based on the law in effect when the judgment was entered in 1984.

In Montana, Mont. Code Ann. § 46-12-204 (1967) (M.C.A.) defined the procedure for a defendant to enter a plea:

(1) The defendant shall enter a plea of guilty or not guilty to the indictment, information, or complaint. . . .

(2) The court may refuse to accept a plea of guilty and shall not accept the plea of guilty without first determining that the plea is voluntary with an understanding of the charge.

Moreover, Montana law does not allow pleas of nolo contendere, however, such a plea is in the rule because it has been recognized by Montana courts in a case where such a plea was entered in federal court and was relevant to a state case. State v. Hansen, 194 Mont. 197, 205, 633 P.2d 1202 (1981). Instead, a guilty plea:

[I]s a confession of guilt and is equivalent to a conviction, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury. By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof.

State v. Scalise, 131 Mont. 238, 309 P.2d 1010, 1017 (1957) (emphasis added).

Likewise, “[b]y entering his plea of ‘guilty’ appellant admitted that the . . . charge was well pleaded and in so doing waives all other defenses other than that the information charges no offense.” State v. Lowery, 148 Mont. 75, 417 P.2d 113, 116 (1966); accord State v. Turcotte, 164 Mont. 426, 427, 524 P.2d 787 (1974).

Thiefault argues that prior to the Montana legislature’s adoption of M.C.A. § 46-12-212 in 1991, which requires the court to determine if a factual basis exists for a guilty plea, a guilty plea need not have been based in facts

before the court could accept it. Therefore, he argues that a guilty plea was not an admission of the facts as alleged in the information. But, Thiefauld's argument is not supported by In re Brown, 185 Mont. 200, 605 P.2d 185 (1980) to which he cites. In Brown, the Montana Supreme Court assessed whether a defendant could withdraw a guilty plea and whether there had been an adequate factual basis for the plea. Id. at 201, 203–04. The court relied on an affidavit of probable cause to support the motion for leave to file an information and held that the document established an adequate basis for the defendant's plea. Id. at 205. Brown shows that prior to M.C.A. § 46-12-212, Montana courts required a factual basis for a guilty plea, but not necessarily a colloquy, and permitted reliance on the information and affidavits supporting the allegations for those facts.

We disagree with Thiefauld that the State must produce evidence indicating what facts a Montana defendant in 1984 specifically admitted to in order to establish the facts for comparability. We hold that pursuant to Scalise Thiefauld's guilty plea necessarily admitted to the facts as pleaded in the information.

Based on the record established by the State, the facts Thiefauld pleaded to are factually comparable to the crime of robbery in Washington. Washington defines robbery as follows:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to

obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Here, the information established that Thiefault attempted to take cash from an employee at Ole's Country Store by entering, while wearing a nylon stocking mask and holding a .44 magnum handgun, which purposely or knowingly attempted to put Delbert David Greenfield, the employee, in fear of immediate bodily injury. These facts, as admitted to by Thiefault in his guilty plea, are sufficient to establish comparability of the offenses.

Thiefault argues that the Montana offense is not comparable to a Washington crime because in 1983, when he pleaded guilty, Montana did not recognize a voluntary intoxication defense. But, the record shows that Thiefault pleaded guilty on March 14, 1984. Then, Montana law clearly recognized that:

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

Former M.C.A § 45-2-203 (1974) (emphasis added). In State v. Stafford, filed prior to Thiefault's guilty plea, the Montana Supreme Court held that a defendant's intoxicated state could be considered by the jury and a defendant is entitled to an instruction regardless of whether the intoxication was voluntary or involuntary. State v. Stafford, 208 Mont. 324, 331-32, 678 P.2d 644, 648

(1984). At the time Thiefauld pleaded guilty Montana law recognized such a defense, and he had an incentive to raise it.

The trial court incorrectly listed the date of Thiefauld's federal rape conviction and misidentifies his Montana conviction as armed robbery instead of attempted robbery. We affirm the sentence and remand for correction of the scrivener's errors as noted.

Appelwick, J.

WE CONCUR:

Schindler, C.

Cox, J.